Supreme Court, U.S.
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No. 09-413

In The Supreme Court of the United States

JIMMY HUSBAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals erred in concluding that reasonable jurists could not find that the failure of trial counsel to investigate, research, or advise Petitioner concerning the statute of limitations constituted ineffective assistance of counsel, since Petitioner's charges were time-barred by the statute of limitations.

2. Whether the Fourth Circuit Court of Appeals erred by failing to consider Petitioner's multiplicity argument, the fact that his indictments were multiplicious, the fact that his sentence was in excess of the maximum allowed by law, and that trial counsel's failure to investigate, research, or advise Petitioner regarding a multiplicity argument constituted ineffective assistance of counsel.

3. Whether the Fourth Circuit erred in failing to recognize that trial counsel did not advise Petitioner of the elements of the crimes or the possibility of consecutive sentences, in failing to recognize that the district court erred in failing to ensure Petitioner understood the elements of the charged offenses and in accepting his guilty pleas, and in failing to

recognize that Petitioner's guilty pleas were not intelligently made or voluntary.

4. Whether the Fourth Circuit erred in failing to consider that the district court's use of the 2002 sentencing guidelines constituted an *ex post facto* violation.

LIST OF ALL PARTIES

Pursuant to Rule 14.1 of the Supreme Court, the undersigned counsel hereby certifies that the following listed persons and parties have an interest in the outcome of this case. These representations are made so that the Judges of this Honorable Court may evaluate possible disqualification or recusal pursuant to the rules of court.

1. Allen, Arenda L. Wright – AUSA/Trial and Sentencing Counsel for Respondent

2. Collins, Christopher J. – Trial and Sentencing Counsel for Petitioner

3. Foreman, Brian S. – Appellate Counsel for Petitioner

4. Husband, Jimmy – Defendant/Appellant/Petitioner

5. McNulty Paul J. – United States Attorney, Counsel for Respondent

6. Moore, Michael C. – AUSA, Counsel for Respondent on Motion to Vacate or Set Aside

7. Rockecharlie, John A. – Counsel for Petitioner on Motion to Vacate or Set Aside

8. Shein, Marica G. – Counsel for Petitioner in Direct Appeal

9. Smith, The Honorable Rebecca Beach – United States District Court Judge

10. Stanton, Jennifer T. – Counsel for Petitioner on Motion to Vacate or Set Aside

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In The Supreme Court of the United States

JIMMY HUSBAND,
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit
Appellate Case No. 08-8330

Petition for Writ of Certiorari

Petitioner respectfully requests that a writ of certiorari issue to review the decision handed down by the Fourth Circuit Court of Appeals on May 6, 2009, as well as the Fourth Circuit's order entered on July 7, 2009, which denied a petition for rehearing and rehearing en banc. The Fourth Circuit denied Petitioner a certificate of

appealability from the district court's denial of his 28 U.S.C.A. § 2255 motion.

The Fourth Circuit's decision in this case stands in direct conflict with not only its own precedent but also with both the United States Constitution and precedent of this Honorable Court. Moreover, the Fourth Circuit's actions in this case are so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's supervisory power. Additionally, this case involves several questions of exceptional importance that should be addressed and settled by this Honorable Court.

OPINION BELOW

The opinion by the Fourth Circuit Court of Appeals is an unpublished opinion. Reference to the opinion is thereby limited to the following: United States v. Husband, No. 08-8330, 325 Fed. Appx. 170 (4th Cir. 2009) (unpublished), rehearing denied, No. 08-8330-II (4th Cir. July 7, 2009).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner respectfully seeks review on Certiorari from the decision rendered by the Fourth Circuit on May 6, 2009, as well as the Fourth

Circuit's order denying a petition for rehearing and rehearing en banc on July 7, 2009.

Pursuant to Rule 10 of the Supreme Court, jurisdiction in the Supreme Court is now appropriate, as the Fourth Circuit is believed to have entered a decision that is in conflict with the United States Constitution and precedent of the Supreme Court and, in addition, has so far departed from the accepted and usual course of judicial proceedings, and sanctioned same by the district court, as to call for an exercise of this Court's supervisory power.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law."

Sixth Amendment

> "In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and

cause of the accusation; . . .and to have the Assistance of Counsel for his defence [sic]."

Fourteenth Amendment

"[No state shall] deprive any person of life, liberty, or property without due process of law."

18 U.S.C. § 2251(a)[1]

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, . . . with the intent that such minor engage *in*, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported or transmitted in interstate or foreign commerce or mailed, . . . or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

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[1] Reference is made herein to the version of this statute in effect at the time of Petitioner's prosecution.

STATEMENT OF THE CASE

On October 15, 2002 a grand jury returned the following indictments against Petitioner: seventeen counts of sexual exploitation of a minor in violation of 18 U.S.C. § 2251(a); one count of transportation of child pornography in violation of 18 U.S.C. § 2252(a)(1); and, two counts of possession of child pornography in violation of 18 U.S.C. § 2252(a)(5)(B). The indictments stemmed from investigations conducted by Newport News, Virginia police, who discovered in Petitioner's home a videotape, which depicted scenes of Petitioner's adopted daughter.

According to the investigation, Petitioner's adopted daughter ("Jane Doe") was under eighteen years of age in 1995 through the spring of 1996, which was when the conduct (i.e., the depiction) was alleged to have occurred. The conduct took place in West Monroe, New York. The videotape was transported to Virginia in 2001 when the family relocated to the Newport News area. None of the depicted conduct or videotaping occurred in Virginia.

On March 27, 2003, the government dismissed counts nine through seventeen based upon evidence that Jane Doe was over eighteen years of age at the time the conduct was alleged to have occurred. On April 7, 2003, Petitioner entered a plea of guilty to counts one through eight. The remaining indictments were dismissed. On July 15, 2003, the

district court sentenced Petitioner to eighty-seven months on each count and ordered same to run consecutively, which resulted in a total term of imprisonment of 696 months.

Petitioner appealed the district court's judgment to the Fourth Circuit Court of Appeals. In his appeal, Petitioner raised multiple issues, including a claim that the statute of limitations should have barred his prosecution, that his trial counsel was ineffective in failing to consider or raise the statute of limitations argument, and that the district court erred in running his sentences consecutively.

The Fourth Circuit affirmed Petitioner's convictions in an unpublished opinion dated January 11, 2005, in which the Court held, *inter alia*, that Petitioner's crimes were inchoate until 2001 when the tape was transported into Virginia. The Fourth Circuit agreed, however, with Petitioner's claim of a sentencing error but held that the same did not violate Petitioner's substantial rights. Petitioner requested an en banc review; the Court denied said request on March 14, 2005.

Petitioner then appealed to this Honorable Court, which, on October 3, 2005, remanded the matter to the Fourth Circuit for further consideration in light of this Honorable Court's decision in United States v. Booker, 543 U.S. 220

(2005). Upon remand from the Fourth Circuit, the district court resentenced Petitioner to a total sentence of 360 months (thirty years). Petitioner appealed this decision to the Fourth Circuit, which affirmed in an opinion dated June 1, 2007.

On May 30, 2008, Petitioner filed a motion to vacate or set aside his sentence pursuant to 28 U.S.C. § 2255. In support of his motion, Petitioner submitted an affidavit of trial counsel, in which trial counsel outlined numerous deficiencies present in his representation of Petitioner. The district court denied Petitioner's motion in a memorandum opinion entered on October 15, 2008. Thereafter, Petitioner sought a certificate of appealability from the Fourth Circuit.

The Fourth Circuit denied the certificate of appealability and dismissed Petitioner's appeal in a per curiam, unpublished opinion entered on May 6, 2009. The Petitioner submitted a request for panel rehearing and an en banc rehearing. The Fourth Circuit denied said requests in an order entered on July 7, 2009.

As this Petition for Writ of Certiorari is timely submitted, the issues herein are properly before this Honorable Court and should be heard because this case departs so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

REASONS FOR GRANTING THE PETITION

I. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT REASONABLE JURISTS COULD NOT FIND THAT THE FAILURE OF TRIAL COUNSEL TO INVESTIGATE, RESEARCH, OR ADVISE PETITIONER CONCERNING THE STATUTE OF LIMITATIONS CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, SINCE PETITIONER'S CHARGES WERE TIME-BARRED BY THE STATUTE OF LIMITATIONS.

Petitioner's prosecution, for the reasons stated in detail below, should have been barred by the statute of limitations. However, trial counsel admitted in the affidavit submitted with the 28 U.S.C. § 2255 motion that he did not investigate, research, or discuss a statute of limitations defense with Petitioner, nor did he raise same in the district court. Accordingly, trial counsel's performance here was deficient *per se*, and Petitioner most certainly suffered prejudice, as he was permitted to plead guilty to time-barred charges. See United States v. Hansel, 70 F.3d 6 (2nd Cir. 1995) (holding that "counsel's failure to object to the time-barred counts

is unaccountable in the circumstances, and cannot 'be considered sound trial strategy'").[2]

The indictments returned in this case alleged Petitioner induced Jane Doe into sexual explicit conduct -- and simultaneously created a visual depiction thereof -- in 1995 and 1996. No other dates were referenced in the indictments, nor did the indictments allege that the offenses were continuing in nature. In United States v. Buculei, 262 F.3d 322, 328 (4th Cir. 2001), the Fourth Circuit ruled that a violation of 18 U.S.C. § 2251(a) was "complete when [the defendant] induced [the victim] into sexually explicit conduct for the purpose of producing a visual depiction thereof." Therefore, applying the proper limitations period of five years[3] to the indictments returned against Petitioner, any prosecution after 2001 should have been barred by the statute of limitations, as the crimes were completed in 1996.

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[2] Under established principles, "to prevail on an ineffective assistance of counsel claim, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness,' and that the defendant was prejudiced as a result of such conduct." Handel, 70 F.3d at 8 (quoting Strickland v. Washington, 466 U.S. 668, 688, 692, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

[3] The applicable statute of limitations for a prosecution under 18 U.S.C. § 2251(a) is five (5) years. See United States v. Thomas, 893 F.2d 1066, 1071 (9th Cir. 1990) (applying 18 U.S.C. § 3282's five year limitation period to 18 U.S.C. § 2251(a)); American Library Association, et. al. v. Reno, 33 F.3d 78, 91 (D.C. Cir. 1995) (finding the five year limitation period set forth in 18 U.S.C. § 3282 applicable to 18 U.S.C § 2251(a)).

Nevertheless, the Fourth Circuit ruled on direct appeal in this case that Petitioner's violations of 18 U.S.C. § 2251(a) were inchoate and thus not complete until the visual depiction later crossed state lines.[4] In other words, the Fourth Circuit held that, because "the grand jury *implied* that the 'jurisdiction element' relied upon in this case was the third prong of § 2251 – that the tape was transported from New York to Virginia *at some unnamed time*," "the clock did not begin running until 2001, when the tape was transported across state lines, not 1995, when actions that were filmed took place." United States v. Husband, 119 Fed. Appx. 475 (4th Cir. 2005) (unpublished) (emphasis added).

However, Petitioner's indictments did not allege the offense was continuing in nature or "inchoate." The only dates referenced in the indictments were the dates when the depiction was made, which according to Buculei, is when the crime is complete. The indictments did not allege a date when the videotape was transported across state lines.[5] Thus, at no point during the proceedings was

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[4] The Fourth Circuit cited United States v. Sirois, 87 F 3d 34 (2nd Cir. 1996) in support of its conclusion. However, it is clear in that case that Sirois's indictment alleged an offense that was continuing in nature.

[5] In addition, no reference was made during Petitioner's plea colloquy that the videotape was actually transported across state lines in 2001

Petitioner placed on notice that he was alleged to have committed an offense that was continuing in nature. However, the Fourth Circuit completely ignored that fact and the corresponding violation of the 5th Amendment's grand jury clause.

Moreover, and on a broader level, the Fourth Circuit's decision to label 18 U.S.C. § 2251(a) an inchoate, continuing offense runs afoul of the criteria for a continuing offense, which this Honorable Court set forth in Toussie v. United States, 397 U.S. 112 (1970). There, this Honorable Court held that an offense cannot be labeled as continuing "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." Congress did not include the requisite explicit language in 18 U.S.C. § 2251(a), and, as Buculei illustrates, the nature of this crime cannot compel a conclusion that Congress intended for it to be treated as a continuing offense.

In sum, Petitioner's prosecutions should have been barred by the applicable five year limitations period, but trial counsel failed to even raise the issue or advise Petitioner regarding the issue. The Fourth Circuit's failure to recognize this shortcoming renders its decision far from accepted judicial proceedings. Moreover, the Fourth Circuit's decision regarding Petitioner's indictments and the statute of

limitations is inapposite to and incompatible with the decision it handed down in Buculei. As a result of trial counsel's ineffective assistance and the Fourth Circuit's refusal to cure the same, Petitioner has suffered a grave injustice. Accordingly, Petitioner prays that this Honorable Court exercise its supervisory power to correct this injustice.

II. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED BY FAILING TO CONSIDER PETITIONER'S MULTIPLICITY ARGUMENT, THE FACT THAT HIS INDICTMENTS WERE MULTIPLICIOUS, THE FACT THAT HIS SENTENCE WAS IN EXCESS OF THE MAXIMUM ALLOWED BY LAW, AND THAT TRIAL COUNSEL'S FAILURE TO INVESTIGATE, RESEARCH, OR ADVISE PETITIONER REGARDING A MULTIPLICITY ARGUMENT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Assuming *arguendo* that the Fourth Circuit's conclusion that Petitioner's crimes were inchoate until 2001 when the depiction traveled through interstate commerce was correct, and for the reasons set forth below, Petitioner could only have been convicted of a single crime. However, the district court ordered Petitioner to serve consecutive sentences on eight counts, resulting in a total sentence in excess of the maximum allowable by law. Trial counsel failed to consider, investigate,

research, or discuss with Petitioner a multiplicity argument or the possibility of consecutive sentences. Notwithstanding this ineffective representation, the Fourth Circuit's refusal to grant a certificate of appealability on this issue overlooks established precedent, which deem it proper to raise a direct challenge to multiplicitous sentences in a 28 U.S.C. § 2255 motion. See United States v. Long, 787 F.2d 538 (10th Cir. 1986); Williams v. United States, 385 F.2d 46 (5th Cir. 1967).

At the very least, 18 U.S.C. § 2251(a) is ambiguous because Congress did not plainly articulate therein the applicable unit of prosecution. See Bell v. United States, 349 U.S. 81, 84 (1955) (holding that "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses"). Because Congress did not clearly include in 18 U.S.C. § 2251(a) what the applicable unit of prosecution is, established precedent of this Honorable Court mandates that the rule of lenity applies in favor of the Petitioner. See United States v. Santos, 128 S. Ct. 2020, 2025 (2007) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the appellants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not

clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.") (citations omitted). The solution to this particular error, therefore, is to vacate the seven multiplicious counts.

Setting aside for a moment the ambiguity of the statute, the facts of this case unquestionably involve only one videotape, which traveled through interstate commerce only one time. Again, assuming *arguendo* the Fourth Circuit was correct on the statute of limitations issue, its decision necessarily implied that transportation through interstate commerce is an essential element of this offense. This "element" clearly happened only one time. Therefore, at most, based upon the facts present here, Petitioner could have only been convicted of and sentenced for a single violation of 18 U.S.C. § 2251(a).[6]

Intertwined with this quandary is the fact that the district court, on remand, again sentenced Petitioner in a fashion inconsistent with this Court's opinion in United States v. Booker, 543 U.S. 220 (2005). The district court clearly based its decision

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[6] In its denial of Petitioner's motion, the district court relied upon United States v. Esch, 832 F.2d 531 (10th Cir. 1987). The facts of that case – the production of sixteen photographs, each of which traveled through interstate commerce – are clearly distinguishable from the case at bar, and the Court's holding in that case inapposite to that compelled by the present matter.

to order consecutive sentences upon facts not in evidence or otherwise admitted by the defendant. At Petitioner's original sentencing, the district court referenced "prior unlawful conduct," "extreme conduct," and the "repetitive nature" of Petitioner's conduct as facts underlying the decision to upwardly depart. Clearly, the district court again based its resentencing decision upon these facts. The error is plain, and Petitioner's substantial rights have been affected.

III. WHETHER THE FOURTH CIRCUIT ERRED IN FAILING TO RECOGNIZE THAT TRIAL COUNSEL DID NOT ADVISE PETITIONER OF THE ELEMENTS OF THE CRIMES OR THE POSSIBILITY OF CONSECUTIVE SENTENCES, IN FAILING TO RECOGNIZE THAT THE DISTRICT COURT ERRED IN FAILING TO ENSURE PETITIONER UNDERSTOOD THE ELEMENTS OF THE CHARGED OFFENSES AND IN ACCEPTING HIS GUILTY PLEAS, AND IN FAILING TO RECOGNIZE THAT PETITIONER'S GUILTY PLEAS WERE NOT INTELLIGENTLY MADE OR VOLUNTARY.

As admitted in his affidavit, trial counsel failed to properly advise Petitioner regarding the elements of the offenses to which Petitioner entered guilty pleas. In addition, and perhaps more importantly, trial counsel admittedly failed to grasp

Petitioner's true sentencing exposure and did not advise him about the possibility of consecutive sentences.[7] Accordingly, counsel's actions fell well below the standard for effective assistance of counsel. See United States v. Gordon, 156 F.3d 376, 380 (2nd Cir. 1986) (holding that "[b]y grossly underestimating Gordon's sentencing exposure [] [counsel] breached his duty as a defense lawyer in a criminal case 'to advise his client fully on whether a particular plea to a charge appears desirable' . . . [counsel's] legal assistance 'fell below the prevailing professional norms' for advising a client during plea negotiations of his maximum exposure to imprisonment at sentencing") (citations omitted).

Notwithstanding trial counsel's ineffective assistance, a district court has an affirmative duty to ensure that a criminal defendant understands the elements of an offense before it accepts a guilty plea. Moreover, the district court must determine that there is a factual basis for the plea. See United States v. Carter, 662 F.2d 274, 276 (4th Cir. 1981) ("A mere statement by the accused that he understands the charge against him does not relieve the court of the responsibility of further inquiry.

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[7] Petitioner acknowledges that during his plea colloquy, he responded in the affirmative to the district court's questions regarding the elements of the offense and his sentencing exposure. However, given the representations contained in trial counsel's affidavit, it is patently clear that the Petitioner did not possess the information necessary to intelligently respond to the district court's queries.

The court must explain the meaning of the charge and what basic acts must be proved to establish guilt.") (citations omitted). See also Rule 11. Here, however, the district court simply read the government's indictments to the Petitioner and, in addition, failed to explore the factual basis for the pleas, specifically in regard to the transportation "element" of this crime.

As a result of both counsel's shortcomings and the court's errors, the guilty pleas accepted by the district court in this case were neither voluntary nor intelligent. The Fourth Circuit, by refusing to address this issue, overlooked established precedent of this Honorable Court, which requires that a valid guilty plea must, at the very least, meet that basic criteria. See Florida v. Nixon, 543 U.S. 175, 185 (2004) (A guilty plea "must be based on express affirmations made intelligently and voluntarily."). See also Henderson v. Morgan, 426 U.S. 637, 645 (n.13) (1976) ("A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense.") (internal citation omitted).

IV. WHETHER THE FOURTH CIRCUIT ERRED IN FAILING TO CONSIDER THAT THE DISTRICT COURT'S USE OF THE 2002 SENTENCING GUIDELINES AT PETITIONER'S RESENTENCING CONSTITUTED AN *EX POST FACTO* VIOLATION.

"The general rule is that the district court should use the sentencing manual in effect at the time of sentencing. . . . There is, however, an exception to the general rule: If use of the then-current manual would violate the Ex Post Facto Clause by subjecting the defendant to a higher sentence, the court should use the version of the manual in effect when the offense was committed." United States v. Myers, 553 F.3d 328, 330 (4th Cir. 2009).

Here, the 2002 sentencing guidelines were applied at Petitioner's resentencing. The 2002 guidelines set forth a higher sentencing range than the 1995 guidelines, which were used at Petitioner's original sentencing. Petitioner acknowledges that the Fourth Circuit, on direct appeal, ruled that the 2002 guidelines should have been used at his original sentencing event. However, that decision was in error because (as previously stated) Petitioner's offenses were completed no later than 1996, and 18 U.S.C. § 2251(a) itself was thereafter amended. The amended statute set forth additional elements and increased punishments, including a

mandatory minimum and maximum term of imprisonment. The district court's application of the 2002 guidelines at the resentencing, therefore, violated the *ex post facto* clause of the Constitution, as Petitioner was exposed to a higher sentencing range than he was under the 1995 guidelines. Nevertheless, the Fourth Circuit's refused to review this issue. Petitioner respectfully asserts that this decision calls for an exercise of this Honorable Court's supervisory power.

CONCLUSION

The foregoing raises serious questions of confidence in the outcome of the prosecution, conviction, and sentencing of Petitioner. Petitioner respectfully contends that the actions taken in this case are so far from the accepted and usual course of judicial proceedings as to call for this Honorable Court to grant certiorari and review these proceedings. To do anything otherwise would perpetuate the miscarriage of justice that has occurred in this case.

WHEREFORE, Petitioner respectfully prays that this Honorable Court grant his writ of certiorari.

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In The
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JIMMY HUSBAND,

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UNITED STATES OF AMERICA,

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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-4630

[ENTERED: January 11, 2005]

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JIMMY RICHARD HUSBAND,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Rebecca Beach Smith, District Judge. (CR-02-125)

Argued: September 30, 2004 Decided: January 11, 2005

Before WILKINSON, GREGORY, and SHEDD, Circuit Judges.

Affirmed by unpublished opinion. Judge Gregory wrote the opinion, in which Judge Wilkinson and Judge Shedd joined.

ARGUED: Marcia Gail Shein, Decatur, Georgia, for Appellant. Arenda L. Wright Allen, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Norfolk, Virginia, for Appellee. ON BRIEF: Paul J. McNulty, United States Attorney, Michael J. Elston, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

GREGORY, Circuit Judge:

In April 2003, Jimmy Richard Husband ("Husband" or "Appellant") pled guilty in the United States District Court for the Eastern District of Virginia to eight counts of sexual exploitation of a minor in violation of 18 U.S.C. § 2251(a) and (d). The court accepted Husband's plea and subsequently sentenced him to 87 months of imprisonment for each of the eight counts and ordered that the sentences be run consecutively, for a total of 696 months, followed by eight three-year periods of supervised release, also to be run consecutively. Husband timely appeals on five grounds: (1) that he was prosecuted and convicted of crimes for which the governing statute of limitation had expired; (2) that his plea was not voluntary and knowing under Fed. R. Crim. P. 11 because the court misinformed him of the actual penalty he could face; (3) that the court failed to establish an adequate factual basis for accepting his plea; (4) that the court violated the Sentencing Guidelines by sentencing him to consecutive rather than concurrent terms; and (5) that his counsel ineffectively assisted him because his counsel failed to raise and argue the statute of limitations defense.

None of Husband's grounds for appeal is meritorious. Accordingly, we affirm.

I

The immediately following facts are admitted by Appellant: "Jane Doe,"[1] Husband's daughter by adoption and the primary victim in this case, was born in late 1979. In 2001, Husband and his family relocated to Newport News, Virginia from West Monroe, New York. On January 8, 2002, a videotape was discovered that depicted eight scenes of

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[1]Out of respect of the victim, we will attempt to minimize revelation of details that would reveal her identity. Unfortunately, the details of this case often make it difficult to do so.

Jane Doe in sexually explicit activities. Three days later, Husband was arrested and charged with possession of child pornography.

The record makes plain that these events then occurred. On October 15, 2002, a federal grand jury returned a twenty-count indictment against Husband, alleging seventeen counts of sexual exploitation of a minor in violation of 18 U.S.C. § 2251(a) and (d), one count of transportation of child pornography in violation of 18 U.S.C. § 2252A(a)(1) ("Count 18"), and two counts of possession of child pornography, both in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(1) and (2) ("Counts 19 and 20"). On December 16, 2002, Husband pled not guilty to all counts, and a jury trial was scheduled. On March 27, 2003, after numerous pretrial motions and pleadings, the district court dismissed the last nine sexual exploitation counts upon the United States' motion because the conduct charged in those counts took place after Doe turned eighteen years old, leaving only counts one through eight to survive. On April 7, 2003, immediately before the jury trial was scheduled to begin, and without the benefit of a plea agreement, Husband pled guilty to the sexual exploitation counts remaining against him. The court subsequently dismissed counts eighteen through twenty with prejudice.

The facts that are most relevant for this appeal took place at the plea hearing. After the judge established Husband's competence, Husband indicated that he wished to plead guilty. The following exchange then occurred between the court and Husband:

> THE COURT: And the maximum possible penalty on each of these counts, then, Mr. Husband, is a maximum of 20 years imprisonment and a minimum of ten years. Do you understand that penalty?

THE DEFENDANT: Yes, ma'am.

J.A. 35. After establishing that Husband would be a felon and lose substantial rights if he pled guilty, the court then informed him that, "in relation to any sentence that the court will impose, the United States sentencing guidelines are in effect [,]" J.A. 35-36, and that, "ultimately under the law, it is up to the court to sentence you under the federal sentencing guidelines." J.A. 46. Husband acknowledged his assent, admitting that he had discussed the Guidelines with his attorney, and also acknowledged that, under the Guidelines he would be sentenced based not only on "the crimes to which you are pleading guilty, but all of your relevant criminal conduct in regard to the crimes to which you are pleading guilty[.]" J.A. 36. The district court then reaffirmed that "you are pleading guilty to the indictment, counts 1 through 8, and those all involve charges of sexual exploitation of a minor[,]" J.A. 37, and restated each count. The judge then clarified that Husband would be subject to supervised release, "not more than three years on each count." J.A. 42. After noting that Husband would not later be able to withdraw his guilty plea because he did not like the sentence, the following statements were made:

> THE COURT: In other words, without a background presentence report, Mr. Husband, the only promise that I can make to you today is that your sentence on counts 1 through 8 would be somewhere between a minimum of 10 years and a maximum of 20; do you understand?
>
> THE DEFENDANT: Yes, ma'am.

J.A. 47. Finally, after ensuring that Husband had no questions about the sentencing guidelines or their application to his case, and ensuring with Husband's

attorney that no meritorious defenses existed, the district court finally allowed Husband to plead guilty.

The government then proffered evidence of Husband's guilt. The evidence included a videotape of the defendant sexually exploiting his minor daughter on multiple occasions in their New York home. The videotape was discovered by Husband's other daughter on January 8, 2002 in Newport News, Virginia. Also included was an oral confession by Husband that he engaged in sexual activity with Doe and videotaped it over a five- to six-year period. Husband also handwrote a two-page statement corroborating his oral admissions and noting that his sexual desire for Doe began when she was "about six or eight." J.A. 53.[2] After the proffer, the following exchange occurred:

> THE COURT: All right.... Mr. Collins, you have heard what the United States claims it could prove had you called upon it to present a case against this defendant. Do you agree with the proffer?
>
> MR. COLLINS: I agree that would be their evidence, yes ma'am.
>
> THE COURT: Mr. Husband, do you agree with the proffer?
>
> THE DEFENDANT: Yes, ma'am.
> THE COURT: Did you still wish to plead guilty?
>
> MR. HUSBAND: Yes, ma'am.

[2]His written admission, however, claimed "oral sex was never done to climax, and there was never penetration of her vagina or anus by me or any other object." J.A. 54. The government proffered a number of witnesses who would refute this claim.

> THE COURT: All right. Then, based upon your guilty pleas and the government's proffer of evidence and your agreement therewith, I would find as a fact that you did commit the sexual exploitation of a minor, as set forth in counts 1 through 8 of the indictment, and I accept your guilty pleas.

J.A. 58-59.

The Presentence Investigation Report ("PSR") concluded that the offenses occurred in 1995 and 1996, so the appropriate Guidelines were from 1995, which relied on a statutory scheme with a maximum penalty of 10 years per count (not 20, as the judge stated, apparently relying upon a later version of the Guidelines). The PSR also found that the offense level was 27 and that Husband's criminal history category was I, which totaled 70-87 months, and that an upward departure may be warranted. The government filed its position on Husband's sentence on June 30th, and Husband filed a "Response... to the Government's Motion for Upward Departure" on July 9th.

The sentencing hearing took place on July 15th, 2003. Husband's counsel did not object to the PSR. He did, however, say he spoke with someone in the probation office, "who assured us that the standard is concurrent sentences." J.A. 117. The judge interrupted immediately, stating,

> Im not going to accept any such argument on the record.... I want to make the record clear, there was no plea agreement whatsoever in this case.... I asked him if any promise had been made to him in return for the plea, and he said no. And I made it clear to him that he faced 2 0 years.

J.A. 117. After more discussion by the judge as to why a probation officer's statements were inapposite, Husband's counsel replied, "I just wanted the court to be aware that that was a primary consideration in the entering of a plea," J.A. 118, whereupon the judge cut counsel off again, making clear that the court would not hear such arguments:

> THE COURT: Frankly, if you want to know the truth, it matters not to me, because if that was a primary consideration, then that should have been made known to the court, and it was never made known to the court.... I know what the plea colloquy was, and I know that it was never discussed that sentences would run concurrently. I advised him that he could get 20 years on each count of conviction. That's what he was advised of.
>
> MR. COLLINS: Yes, ma'am. Nothing further.
>
> THE COURT: All right.

J.A. 118-19.

In support of its request for an upward departure, the government called four witnesses - the case agent, the victim, the victim's mother, and a clinical social worker - to testify to the especially heinous and prolonged nature of the sexual abuse. We will spare the reader the details by noting only that the evidence was, simply put, sad, horrible, and clearly damning.

The court took great pains to establish adequate grounds for Husband's sentence by noting that the prolonged and heinous and degrading behavior over an extremely long period of time along with the repetitive nature of the conduct was sufficient to upwardly depart.

But, it generally appears that, in fact, the court never officially granted the motion for upward departure. See infra n. 7. Rather, the court simply sentenced Husband to 87 months for each count to run consecutively for a total of 696 months, in apparent belief that this was appropriate absent an upward departure. In justifying the decision, the court noted,

> So basically I would find that there are all of these grounds to depart upward. If for some reason the consecutive sentences don't hold, I want to make it clear that this would be an alternative grounds for the court to depart upward. However, I'm of the opinion that in this particular case I do not believe that the sentence imposed on the counts and letting them run concurrently would be at all adequate under the factors set forth in the law. The sentence would be somewhere between - 70 to 87 months is the guideline range, and certainly an 87-month sentence is not sufficient to punish, to remedy this conduct, to meet the heinous activity that has occurred in this particular case. . . . the thrust of this is that the court can run the sentences consecutive if necessary to achieve the appropriate total punishment, considering all of the matters that I have found as a fact here today, which are basically facts in the presentence report.... the way I would propose to proceed is to sentence him within the guidelines on each of the counts and to run those sentences consecutively.

J.A. 124-26. Again, Husband did not object. Now, however, he appeals on the above-stated grounds.

II.

We now address each of Husband's arguments in turn. The short answer is that we affirm on all counts.

A.

Husband first argues that the applicable statute of limitation had expired, and thus that his guilty plea should not have been accepted. Because Husband failed to object below, plain error review governs. See Fed. R. Crim. P. 52(b); United States v. Jarvis, 7 F.3d 404, 409-10 (4th Cir. 1993). This means, of course, that Husband must clear the high hurdle of proving that (1) there was error, (2) the error was plain, (3) the error affected substantial rights, and (4) the error "'seriously affect(s) the fairness, integrity or public reputation of judicial proceedings.'" United States v. Olano, 507 U.S. 725, 732-37 (1993); United States v. Martinez, 277 F.3d 517, 524 (4th Cir. 2002).

It has long been the law in this circuit that a valid guilty plea waives all non-jurisdictional defenses. See, e.g., United States v. Willis, 992 F.2d 489, 490 (4th Cir. 1993) (voluntary guilty plea waives all non-jurisdictional defects); Bloombaum v. United States, 211 F.2d 944, 945 (4th Cir. 1954) (same). Applying this rule here, we find that Husband's plea waives his statute of limitations argument, which is, of course, a non-jurisdictional affirmative defense. See, e.g., United States v. Matzkin, 14 F.3d 1014, 1017-18 (4th Cir. 1994) (statute of limitations is not a jurisdictional defense and can be waived; counsel's failure to seek statute of limitations jury instruction was not plain error even though it was "not an intentional relinquishment of a known right; but was a failure to make the timely assertion of that right"); United States v. Williams, 684 F.2d 296, 299 (4th Cir. 1982), cert. denied, 459 U.S. 1110 (1983) (18 U.S.C. § 3282 is

not jurisdictional, but affirmative defense that may be waived).

While this is surely enough to end the inquiry, because the statute of limitations issue becomes relevant to subsequent arguments, we note that Husband's statute of limitations claim is meritless for a number of reasons, not the least of which is that the final element of his crime was not complete until 2001, when the tape was transported across state lines.[3] The statute of limitations does not begin until all the elements necessary for the crime are completed. See, e.g., United States v. Crossley, 224 F.3d 847, 859 (6th Cir. 2000) (statute of limitations begins to run only when all elements of crime have occurred); United States v. United Med. and Surgical Supply Corp., 989 F.2d 1390, 1398 (4th Cir. 1993) (securities or mail fraud is not complete until sale of security or use of the mail). Thus, the clock did not begin running until 2001, when the tape was transported across state lines, not 1995, when actions that were filmed took place. See United States v. Sirois, 87 F.3d 34, 39 (2d Cir. 1996). As such, the case was unquestionably within any applicable statute of limitations.

B.

Husband also argues that his guilty plea was involuntary because the district court failed to advise him of the true penalty he faced as a result of his guilty plea. As noted above, the trial judge, apparently relying on a more

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[3]The grand jury indictment implied that the "jurisdictional element" relied upon in this case was the third prong of § 2251 - that the tape was transported from New York to Virginia at some unnamed time. At the plea hearing, the government also noted that the tape showed conduct from New York and was found in Virginia. Thus, the government contends that the crime was inchoate until 2001. Husband's counsel apparently agreed: at the sentencing hearing, Husband's counsel admitted that, "It was, in fact, his taking it across state lines that made it a federal case." J.A. 115.

current version of the Sentencing Guidelines, told Husband at the plea hearing that he was subject to 10 to 20 years of prison for each count (and then, Husband contends, for all counts). The PSR, however, subsequently recommended - and Husband was evidently ultimately sentenced under - the 1995 Sentencing Guidelines, which mandated a maximum 10-year sentence per count.[4] The real issue here, though, is that the court sentenced Husband to consecutive terms. Husband argues that he was given more punishment than he was warned of, and that, as a result, his plea was unknowing and involuntary.

Trial courts conducting plea colloquies are given deference. United States v. DeFusco, 949 F.2d 114, 116 (4th Cir. 1991), cert. denied, 503 U.S. 997 (1992) ("this Court should accord deference to the trial court's decision as to how best to conduct the mandated colloquy with the defendant"). Consequently, "any Rule 11 violations should be evaluated under a harmless error standard." Id. at 117. See also Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

In accepting a guilty plea, the court must simply determine "whether the defendant's knowledge and comprehension of the full and correct information would

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[4]The PSR mistakenly relied upon the idea that the crimes were completed in 1995, and thus that the 1995 Sentencing Guidelines were in effect. This was error because, as we explained in Part II.A, supra, the crime was inchoate until 2001, when the videotape crossed state lines. Section 1B1.11 of the Guidelines requires courts to use the "Guidelines Manual in effect on the date that the defendant is sentenced[,]" unless doing so would violate the ex post facto clause. Because Husband was Sentenced on July 15, 2003, and because the 2002 Guidelines were identical to those in effect in 2001 for purposes of Husband's crime, the 2002 Sentencing Guidelines should have been used. However, since Husband was sentenced under a Guidelines scheme counseling the 1995 statutory maximum of 10 years per count rather than the 2001 statutory maximum 20, the error was in Husband's favor, and thus harmless.

have been likely to affect his willingness to plead guilty." United States v. Goins, 51 F.3d 400, 402 (4th Cir. 1995). In determining whether a defendant's plea is acceptable, the court should focus on "three main elements":

> The court must first ascertain what the defendant actually knows when he pleads guilty on the basis of an affirmative indication in the record. Second, the court must decide what information would have been added to the defendant's knowledge by compliance with Rule 11. Finally, the court must determine how the additional or corrected information would have likely affected the defendant's decision.

Id. (citing United Stats v. Padilla, 23 F.3d 1220, 1222 (7th Cir. 1994) and United States v. Johnson, 1 F.3d 296, 302 (5th Cir. 1993)).

We have reviewed the transcript of the plea hearing with care (but also with the requisite deference), and find that the judge adequately complied with Fed. R. Crim. P. 11. Likewise, we hold that Husband knew or surely should have known that a sentence under the Guidelines could include an upward departure. Thus, it follows that no information would have been added to the defendant's knowledge, and Husband's "knowledge and comprehension of the full and correct information would not have been likely to affect his willingness to plead guilty." Goins at 402.

Husband relies upon the following exchange from the plea hearing as evidence that his plea violated Rule 11 and was not knowing and voluntary:

> THE COURT: In other words, without a background presentence report, Mr.

> Husband, the only promise that I can make to you today is that your sentence on counts one through eight would be somewhere between a minimum of ten years and a maximum of 20; do you understand?
>
> THE DEFENDANT: Yes, ma'am.

J.A. 47. Husband clings to this single statement with a vise-like grip, and extrapolates from it - particularly, the singular use of the word "sentence" - that the judge "promised" no more than 2 0 years in prison in total.[5]

Appellant's assertion that he did not know he might be sentenced to more than twenty years might have more merit if this was the only instance of the court discussing his potential punishment. But, of course, it is not the only instance. The judge stated, "And the maximum possible penalty on each of these counts, then, Mr. Husband, is a maximum of 20 years imprisonment and a minimum of ten years. Do you understand that penalty?" J.A. 35 (emphasis added). Husband replied affirmatively. The judge also noted that Husband would be subject to supervised release, "not more than three years on each count." J.A. 42 (emphasis added). Finally, the court also informed him prior to his guilty plea that, "in relation to any sentence that the court will impose, the United States sentencing guidelines are in effect," J.A. 35-36, and that, "ultimately under the law, it is up to the court to sentence you under the federal sentencing guidelines[.]" J.A. 46. See also J.A. 48. Husband assented to these statements, stated that he had discussed the

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[5]Husband also puts forth the odd argument that his plea was not knowing and voluntary because he was unaware of his appellate counsel's statute of limitations argument. Since we disposed of the statute of limitations issue in Part I.A., supra, we will expend no more effort on it here. Suffice it to say that a criminal defendant thinking of relying on his ignorance of a meritless affirmative defense to overcome an otherwise knowing guilty plea may wish to consider other arguments.

Guidelines with his attorney, and also acknowledged at least twice more the court's assurance that, under the Guidelines he would be sentenced based on the totality of his criminal conduct: not only on "the crimes to which you are pleading guilty, but all of your relevant criminal conduct in regard to the crimes to which you are pleading guilty[.]" J.A. 36.

Further, in attempting to decipher "what the defendant actually knows when he pleads guilty on the basis of an affirmative indication in the record," Goins, 51 F.3d at 402, one cannot ignore the fact that Husband was represented by a lawyer. Husband admits to discussing the Guidelines with his lawyer (who, of course, should have explained the Guidelines and indicated the possibility of upward departure). Thus, any reasonable reading of the transcript indicates that Husband knew or should have known that the equivalent of consecutive sentences was possible through upward departure.

Finally, however, had Husband been unsure of how his sentence would be calculated - stated otherwise, had he lied to the district court when he acknowledged that he understood that the Guidelines governed and that he had discussed how they worked with his lawyer - we have no reason to believe that he would not have pled guilty.[6] Given the overwhelming nature of the government's proffered evidence (including actual videotaping of the sexual exploitation), Husband had no shortage of good reasons for not going to trial. For example, he apparently got the government to drop counts 18, 19, and 20 by pleading guilty. Additionally, while we only review a cold record,

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[6]Indeed, if his understanding of the sentence was truly unclear (which seems to be the best he could hope for upon a full and fair reading of the record), Husband said nothing and still pled, it seems to lead to the conclusion that his sentence was not really a primary consideration in his decision of whether to plead guilty; that is, other things were driving him.

Husband expresses regret for the humiliation his actions caused his family. It is highly likely that, in a case with facts this uncontested, horrible, and hurtful, he did not want the public shame of a trial. Indeed, perhaps he wished not to force his family to endure yet another wrenching experience. In short, Husband must have (or at the very least should have) known that the court could upwardly depart, and even if he had not known, it remains entirely unclear that this knowledge would have been "likely to affect his willingness to plead guilty." Goins, 51 F.3d at 402.

C.

Appellant also contends that the court failed to find sufficient evidence for his plea. "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). "The court need not satisfy itself that a jury would find the defendant guilty, or even that defendant is guilty by a preponderance of the evidence." United States v. Carr, 271 F.3d 172, 179 n.6 (4th Cir. 2001). Rather, the district court "need only be subjectively satisfied that there is a sufficient factual basis for a conclusion that the defendant committed all of the elements of the offense. The district court possesses wide discretion in determining whether a sufficient factual basis exists." United States v. Mitchell, 104 F.3d 649, 652 (4th Cir. 1997). The standard of review for such claims is abuse of discretion. Carr, 271 F.3d at 179.

The district court decidedly did not abuse its discretion. The judge read all eight counts, and later asked Husband whether he wished that the judge review the eight counts again before asking for Husband's plea. Husband did not want to review the counts and pled guilty. Before accepting Husband's plea, the government proffered its evidence, the judge asked Husband whether he agreed with the proffer, and Husband and his counsel both agreed. The

government's proffered evidence of guilt was overwhelming. Each element was listed in the indictments and reasonably reviewed to the judge's subjective satisfaction in the guilty plea hearing. Thus, the court established a sufficient basis for the plea.

D.

Husband also appeals his punishment of eight consecutive 87-month sentences followed by eight consecutive three-year terms of supervised release. Husband's contention is that the combined offense level for the eight similar counts was properly grouped in the PSR. As such, since the 1995 Guideline-based range of 70-87 months per count fell below the (incorrect) statutory maximum of ten years, the extent of any consecutive sentence could only rise to the level of the (alleged) maximum.

The government, in response, rightly admits that the court could not have run the sentences consecutively in this case absent a departure, but argues that the consecutive sentences are appropriate because the district court properly upwardly departed from the Guidelines. Because he failed to object to the sentencing below, this issue too is reviewed for plain error. United States v. Jarvis, 7 F.3d 404, 409-10 (4th Cir. 1993).

First, as noted above and explained in footnote 4, supra, the court erred by using the 1995, rather than the 2002, Sentencing Guidelines. But this error was clearly in Husband's favor: his sentence was half of what he could have received under the 2002 Guidelines. More

fundamentally, however, the court did not, as it should have, clearly grant the motion for upward departure.[7]

Even granting that the district court erred by not officially granting the motion for upward departure, this error does not harm Husband because, if we were to remand, the court undoubtedly would grant an upward departure and sentence Husband to precisely the same 696-month sentence that he has now if we remanded the matter to the court. Specifically, the court explains,

> If for some reason the appellate court is not in agreement with me, then my alternative ruling is that I would upwardly depart on these matters. In other words, I would not be in the guideline range here. I would upwardly depart and do an appropriate sentence with an upward departure that would meet the goals of this particular case.

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[7] The record states that, at the sentencing hearing on 7/15/2003, "Court granted gov's motion for upward departure." J.A. 6. The transcript of the hearing, however, complicates things. Essentially, it seems that the court started to rule on the motion, discussed the grounds for upward departure, and indicated its general, strong, and wide-based support for the motion ("I have reviewed those cases, verified their validity, and they support the government's proposition," J.A. 121) and general disapproval of Husband's opposition brief ("The defendant counters that the past conduct is accounted for by the guideline calculations, but I don't agree. . .") . Id. The court then further submits the reasons why the government's position was correct on several different grounds. Things are continually confused, however, by the judge's consistent use of conditional verbs, e.g., "I would find that certainly an upward departure would be warranted. . ."; "Likewise I would find that a departure would be warranted because of the repetitive nature of the conduct."; "So basically I would find that there are all of these grounds to depart upward.". J.A. 123-24 (emphasis added). Ultimately, and particularly when considering the court's Statement of Reasons, it appears clear enough to us that the district court errantly believed that it could sentence Husband to consecutive terms absent an upward departure, and thus that it did not actually grant the government's motion at the sentencing hearing.

J.A. 125-26. As noted above, the statutory maximum for the crime is 10 years per count even if the court uses the PSR's recommendation (which, as the district court ultimately recognized, is a mistake, given that the proper standard is a 20 year maximum, but one we will not here correct because it favors Husband) . Thus, even granting that there was an error, and that it may have been "plain," the error certainly does not affect Husband's substantial rights, for he would justifiably receive precisely the same sentence. See Olano, 507 U.S. at 732-37.

E.

Finally, Husband claims that his counsel was ineffective because he failed to raise the statute of limitations defense. Claims of ineffective assistance may not be raised on direct appeal unless the record demonstrates ineffectiveness conclusively. United States v. Richardson, 195 F.3d 192, 198 (4th Cir. 1999); United States v. King, 119 F.3d 290, 295 (4th Cir. 1997); United States v. Hoyle, 33 F.3d 415, 418 (4th Cir. 1994). Ineffective assistance of counsel claims must meet the two-step test of Strickland v. Washington, 466 U.S. 668, 687 (1984): (1) counsel's performance is objectively deficient, and (2) the deficient performance prejudices the defendant. Because, as explained in Part II.A, supra, the statute of limitations argument is meritless, failure to make it cannot be deficient at all, much less "objectively" so. Likewise, Husband is in no way prejudiced by his counsel's conduct.

III

For all the reasons as stated above, on all issues raised by Appellant, the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Newport News Division

[ENTERED: July 16, 2003]

UNITED STATES OF AMERICA

v.

Case Number
4:02CR00125-001

JIMMY RICHARD HUSBAND,

Defendant.

JUDGMENT IN A CRIMINAL CASE

The defendant, JIMMY RICHARD HUSBAND, was represented by Christopher J. Collins.

The defendant pleaded guilty to count(s) 1, 2, 3, 4, 5, 6, 7, and 8. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
T.18:2251(a)(d) 2256(1) and (2)	Knowingly use persuade, induce, entice and coerce a minor child, "Jane Doe," to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct which was transported in interstate commerce (Felony)	Summer or Fall 1995	1
T.18:2251(a)(d), 2256(1) and (2)	Knowingly use, persuade, induce, entice and coerce "Jane Doe" to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct which was transported in interstate commerce (Felony)	Summer or Fall 1995	2 and 3

On motion of the United States, the court has dismissed count(s) 18, 19, and 20 with prejudice.

As pronounced on July 15, 2003, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Given this 15th day of July, 2003.

/s/ Rebecca Beach Smith
Rebecca Beach Smith
United States District Judge

Defendant's SSN: 512-54-5196 USM#: 09491-031
Defendant's Date of Birth: 5/3/52
Defendant's Mailing Address: Western Tidewater Regional Jail, 2402 Godwin Boulevard, Suffolk, Virginia 23434
Defendant's Residence Address: 1601 Willow Lane, Garden City, Kansas 67846

Continuation of Counts from Page 1

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
T.18:2251(a)(d), 2256(1) and (2)	Knowingly use, persuade, induce, entice and coerce "Jane Doe" to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct which was transported in interstate commerce (Felony)	Fall 1995	4
T.18:2251(a)(d), 2256(1) and (2)	Knowingly use, persuade, induce, entice and coerce "Jane Doe" to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct which was transported in interstate commerce (Felony)	February 19, 1996	5

T.18:2251(a)(d), 2256(1) and (2)	Knowingly use, persuade, induce, entice and coerce "Jane Doe" to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct which was transported in interstate commerce (Felony)	Spring 1996	6, 7

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SIX HUNDRED NINETY-SIX (696) MONTHS. The term consists of EIGHTY-SEVEN (87) MONTHS on counts one, two, three, four, five, six, seven and eight, all to be served consecutively.

The court makes the following recommendations to the Bureau of Prisons:

The court directs that while incarcerated, the defendant shall participate in a substance abuse program.

The court directs that while incarcerated, the defendant shall receive mental health counseling for his pedophiliac tendencies and sexually aberrant behavior, and any other mental health treatment appropriate for his sex offender status.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

Mailed:
c: P.O. (2) (3)
Mshl. (4) (2)
U.S.Atty.
U.S.Coll.
Dft. Cnsl.
PTS
Financial
Registrar
ob

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TWENTY-FOUR (24) YEARS. The term consists of THREE (3) YEARS on counts one, two, three, four, five, six, seven, and eight, all to run consecutively.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance.

While on supervised release, the defendant shall not possess a firearm or destructive device.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISED RELEASE

The defendant shall comply with the standard conditions that have been adopted by this court (set forth, below):

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant-shall notify the Probation Officer within 72 hours, or earlier if so directed, of any change in residence.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, pursuant to this Judgment, the defendant shall also comply with the following additional conditions:

1) The defendant shall not incur new credit card charges or open additional lines of credit without the approval of the probation officer.

2) The defendant shall provide the probation officer with access to requested financial information.

3) The defendant shall continue to participate in a substance abuse program, at the direction and discretion of the probation officer.

4) The defendant shall comply with all applicable federal, state, and local laws regarding sex offender registration.

5) The defendant shall be prohibited from having any contact with the victim or the victim's mother.

6) The defendant shall not possess or use a computer to access any online computer services at any location, including employment, without the prior approval of the probation officer and the court. This includes any internet service providers, bulletin board systems, or any other public or private computer network.

7) The defendant shall not have any access to or possess any pornographic material or pictures displaying nudity or any magazines using young juvenile models or pictures of juveniles under the age of 18.

8) The defendant shall not be in the presence of children under the age of 18 years without another responsible adult being present in the same room or area.

9) The defendant shall be required to continue to participate in a sex offender's treatment program throughout the term of supervision.

10) The defendant shall submit to polygraph testing as directed by the United States Probation Officer as part of his sex offender therapeutic program. The

costs of the testing are to be paid by the defendant as directed by the probation officer.

11) The defendant shall submit to Penile Plethysmograph or Abel Testing as directed by the United States Probation Office as part of his sexual offender therapeutic treatment. The costs of the testing are to be paid by the defendant as directed by the probation officer.

12) The court does not deny federal benefits because it is not applicable.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total monetary penalties in accordance with the schedule of payments set out below.

Count	Special Assessment	Fine
1	$50.00	
2	$50.00	
3	$50.00	
4	$50.00	
5	$50.00	
6	$50.00	
7	$50.00	
8	$50.00	
Total	$400.00	

FINE

No fines have been imposed in this case.

COSTS

The court waives the cost of prosecution, incarceration, and supervised release except for the costs of the testing encompassed with his mental health treatment.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The special assessment is due in full immediately. If not paid immediately, the court authorizes the deduction of appropriate sums from the defendant's account while in confinement in accordance with the applicable rules and regulations of the Bureau of Prisons.

Any special assessment, restitution, or fine payments may be subject to penalties for default and delinquency.

If this judgment imposes a period of imprisonment, payment of Criminal Monetary penalties shall be due during the period of imprisonment.

All criminal monetary penalty payments are to be made to the Clerk, United States District Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

STATEMENT OF REASONS
(Not for Public Disclosure)

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except:

Sentences on each count run consecutively as opposed to concurrently.

Guideline Range Determined by the Court:

Total Offense Level: 27
Criminal History Category: 1
Imprisonment Range: 70 to 87 months (per count)
Supervised Release Range: 2 to 3 years
Fine Range: $ 12.500 to $ 125.000

[X] Fine waived or below the guideline range because of inability to pay. Restitution: $ 868.

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range, does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s);

The sentence on each count is within the guideline range. However, the court finds it necessary to run the sentences on the counts consecutively to meet the total punishment required to best serve the

sentencing objectives of punishment, deterrence, and rehabilitation.

OR

[ ] The sentence departs from the guideline range.

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

RESTITUTION AND FORFEITURE

RESTITUTION

The court, pursuant to the Victim and Witness Restitution Act, finds that the following is/are victim(s) of defendant's criminal conduct and has/have sustained loss in the indicated amounts and orders $868.00 restitution by the defendant as follows:

Name & address of payee(s)	Amount
The victim's name and address are identified in Document number 23, filed under SEAL with The court on July 15, 2003.	$868.00
Total	$868.00

Payments of restitution are to be made to Clerk, U. S. District Court.

Restitution is due and payable immediately.

Interest on the restitution has been waived.

If there are multiple payees, any payment not made directly to a payee shall be divided proportionately among the payees named unless otherwise specified here:

FORFEITURE

The court entered a Consent Order of Forfeiture on July 15, 2003.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[ENTERED: March 14, 2005]

FILED
March 14, 2005

No. 03-4630
CR-02-125

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

JIMMY RICHARD HUSBAND
Defendant - Appellant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Gregory, and Judge Shedd.

For the Court,

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

[ENTERED: October 15, 2002]

UNITED STATES OF AMERICA	)	UNDER SEAL
v.	)	CRIMINAL NO. 4:02cr
JIMMY RICHARD HUSBAND	)	18 U.S.C. §§ 2251(a)(d) and 2256(1), (2) Sexual Exploitation of a Minor (Counts 1-17)
	)	18 U.S.C. §§ 2252A(a)(1)) and 2256(1) and (2) Transportation of Child Pornography (Count 18)
	)	18 U.S.C. §§ 2252A(a)(5) (B) and 2256(1) and (2) Possession of Child Pornography (Counts 19-20)
	)	18 U.S.C. § 2253 Criminal Forfeiture

INDICTMENT

October 2002 Term – at Norfolk, Virginia

COUNT ONE

THE GRAND JURY CHARGES THAT:

In or about the Summer or Fall 1995, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 20 minutes, did knowingly use, persuade, induce, entice and coerce a minor child (hereinafter, referred to as "Jane Doe"), on a sofa located in the basement of 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is, the lascivious exhibition of the genitals and pubic area, urination, genital-genital and oral-genital sexual intercourse, and masturbation, with the intent that said minor engage in sexually-explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

In or about the Summer or Fall 1995, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 15 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," sitting on an office chair located in the basement of 8250 Gulf

Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is the lascivious exhibition of the genitals and pubic area, masturbation, and oral-genital sexual intercourse, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

In or about the Summer or Fall 1995, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 5 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," sitting nude on the side of the bathtub in the children's bathroom located on the second floor of 8250 Gulf Bridge Road, West Monroe, New York, to engage in sexually explicit conduct, that is masturbation and the lascivious exhibition of the genitals and pubic area, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code Sections 2251(a)(d), 2256(1) and (2)).

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

In or about the Fall 1995, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 10 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," standing nude on the bed in the master bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is the lascivious exhibition of the genitals and pubic area and masturbation, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about February 19, 1996, JIMMY RICHARD HUSBAND, the defendant, for approximately 5 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," nude and dancing on the bed in the minor child's bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is the lascivious exhibition of the genitals and pubic area and masturbation, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New

York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT:

In or about the Spring 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 5 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," nude and leaning back against a sofa in the living room located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is the lascivious exhibition of the genitals and pubic area and masturbation, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about the Spring 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 15 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," on the bed in her bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct with the

intent that said minor engage in sexually explicit conduct, that is masturbation and the lascivious exhibition of the genitals and pubic area, for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

In or about the Spring 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 10 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," in the living room located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct with the intent that said minor engage in sexually explicit conduct, that is the lascivious exhibition of the genitals, oral-genital sexual intercourse and masturbation, for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT NINE

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 30 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," lying nude on the bed in the master bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is oral-genital sexual intercourse, masturbation, and the lascivious exhibition of the genitals and pubic area, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT TEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 30 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," sitting nude on the edge of the bed in the master bedroom located at 8250 Gulf Bridge Road, West Monroe, New York, to engage in sexually explicit conduct, that is the lascivious exhibition of the genitals, urination, masturbation, and oral-genital sexual intercourse, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in

interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 30 minutes did knowingly use, persuade, induce, entice and coerce "Jane Doe," in the master bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to remove her white bra and panties, and then engage in sexually explicit conduct, that is urination, the lascivious exhibition of the genitals and pubic area, oral-genital sexual intercourse, and masturbation, with the intent that said minor engage in the sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections2251(a)(d), 2256(1) and (2)).

COUNT TWELVE

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 15 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," wearing an olive T-

shirt in the master bedroom located at 8250 Gulf Bridge Road, West Monroe, New York, to engage in sexually explicit conduct with the intent that said minor engage in sexually explicit conduct, that is urination, masturbation, and the lascivious exhibition of the genitals, for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT THIRTEEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 15 minutes did knowingly use, persuade, induce, entice and coerce "Jane Doe," lying nude in the master bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct with the intent that said minor engage in sexually explicit conduct, that is urination, masturbation and the lascivious exhibition of the genitals and pubic area, for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In. violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT FOURTEEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 15 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe" lying nude and wearing white socks while in the master bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is the lascivious exhibition of the genitals and pubic area and masturbation, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT FIFTEEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 40 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe" who was wearing red panties, a white bra and socks while in the master bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is the masturbation, the lascivious exhibition of the genitals and pubic area and oral to genital sexual intercourse, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce

from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT SIXTEEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 30 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe"" who was wearing a white T-shirt and bra while in the master bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is the lascivious exhibition of the genitals and pubic area, oral-genital sexual intercourse and masturbation with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT SEVENTEEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 20 minutes, did knowingly use, persuade, induce, entice and coerce "Jane *Doe,*" nude and wearing only socks and a watch band while in the master bedroom

located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is urination, the lascivious exhibition of the genitals and pubic area and masturbation with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT EIGHTEEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about October 2001, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant did knowingly transport in interstate and foreign commerce, from 8250 Gulf Bridge Road, in West Monroe, New York, to 471 Harcourt Place, in Newport News, Virginia, in the Eastern District of Virginia, one (1) VHS video tape depicting child pornography.

(In violation of Title 18, United States Code, Sections 2252A(a) (1) and 2256(1) and (2)).

COUNT NINETEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 11, 2002, at 471 Harcourt Place, in Newport News, Virginia, in the Eastern District of Virginia, JIMMY RICHARD HUSBAND, the defendant herein, did knowingly and unlawfully possess material that is one (1) VHS video tape which contained an image of child

pornography that had been transported in interstate commerce.

(In violation of Title 18, United States Code, Sections 2252A(a)(5)(B), 2256(1) and (2)).

COUNT TWENTY

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 11, 2002, at 471 Harcourt Place, in Newport News, Virginia, in the Eastern District of Virginia, JIMMY RICHARD HUSBAND, the defendant herein, did knowingly and unlawfully possess material, that is one (1) HP mid-power computer, containing a Maxtor model #94610U6 hard drive, made in Singapore, which contained an image of child pornography, that is a jpg image entitled "np32.jpg" and a video entitled "heather.mpg" which was produced using material that had been shipped or transported in interstate and foreign commerce.

(In violation of Title 18, United States Code, Sections 2252A(a)(5)(B), 2256(1) and (2)).

CRIMINAL FORFEITURE

Upon conviction for violating Title 18, United States Code, Sections 2251(a)(d), 2252A(a)(1) or 2252A(a)(5)(B), defendant JIMMY RICHARD HUSBAND shall forfeit to the United States any and all matter which contains visual depictions produced, transported, shipped or received in violation thereof and any and all property used or intended to be used in any manner or part to commit and to promote the commission of the aforementioned violation, seized from 471 Harcourt Place, Newport News, Virginia, on January 11, 2002, including but not limited to the following:

a. one (1) VHS tape described in Counts 18 and 19;

b. miscellaneous sex toys (including two vibrators and one pocket vagina);

c. one (1) "Family Taboo" Magazine;

d. one (1) "Perverted The Babysitters- Volume #1" VHS Tape;

e. one (1) Sony Digital Camera and Solidex Tripod;

f. one (1) Hewlett Packard Pavilion Hard Drive, Serial #US02802347, containing one (1) Maxtor model #94610U6 hard drive;

g. eight (8) ZIP 100 media depicting bestiality;

h. all VHS tapes depicting adult pornography seized by the Newport News Police Department and the Gloucester Sheriff's Department; and

i. any and all pictures of the minor described in Counts One through Nineteen of the Indictment.

(In violation of Title 18, United States Code, Section 2253).

A TRUE BILL:

/s/
FOREPERSON

PAUL J. McNULTY
UNITED STATES ATTORNEY

By: /s/ Arenda L. Wright Allen
Arenda L. Wright Allen
Assistant United States Attorney
Virginia State Bar #35517
101 West Main Street, Suite 8000
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(757) 441-6331

FILED: July 7, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-8330

(4:02-cr-00125-RBS-JEB-1)

(4:08-cv-00061-RBS)

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JIMMY RICHARD HUSBAND,

Defendant – Appellant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Gregory and Judge Shedd.

For the Court
/s/ Patricia S. Connor, Clerk

FILED: May 6, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-8330
(4: 02-cr-00125-RBS-JEB-1)
(4: 08-cv-00061-RBS)

UNITED STATES OF AMERICA,

Plaintiff — Appellee

V.

JIMMY RICHARD HUSBAND,

Defendant — Appellant

JUDGMENT

In accordance with the decision of this Court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

PER CURIAM:

Jimmy Richard Husband seeks to appeal the district court's order denying relief on his 28 U.S.C.A. § 2255 (west Supp. 2008) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c) (1) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c) (2) (2006). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that Husband has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

JIMMY RICHARD HUSBAND

Petitioner.

v. **CRIMINAL ACTION NO. 4:02cr125**
CIVIL ACTION NO. 4:08cv61

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND FINAL ORDER

This matter comes before the court on petitioner Jimmy Richard Husband's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. For the reasons set forth below, petitioner's motion is **DENIED**.

I. Factual and Procedural History

On October 16, 2002, a federal grand jury in the Eastern District of Virginia indicted petitioner Jimmy Richard Husband, charging him with Sexual Exploitation of a Minor in violation of 18 U.S.C. §

2251(a) (Counts One through Seventeen), Transportation of Child Pornography in violation of 18 U.S.C. § 2252A(a) (1) (Count Eighteen), and Possession of Child Pornography in violation of 18 U.S.C. § 2252A(a) (5) (8) (counts Nineteen and Twenty) . On April 7, 2003, petitioner pled guilty to Counts One through Eight. Petitioner's plea was not entered through a written plea agreement; rather, petitioner pleaded guilty on the day that the trial was scheduled to begin.

On July 15, 2003, this court sentenced petitioner to serve eighty-seven (87) months imprisonment on each of Counts One through Eight, and ordered the sentences to run consecutively, for a total term of imprisonment of six hundred ninety-six (696) months. Petitioner was represented through the initial sentencing by Christopher J. Collins, Esquire.

Petitioner appealed this judgment on July 25, 2003. Husband was represented on appeal by Marcia G. Shein, Esquire.1 The United States Court of Appeals for the Fourth Circuit affirmed the conviction and sentence. United States v. Husband, 119 Fed. App'x 475 (4th Cir. 2005) (unpublished) (Husband I).

Petitioner then filed a petition for a writ of certiorari in the United States Supreme Court. On October 3, 2005, the Supreme Court granted the

petition, vacated the judgment, and remanded the case to the Fourth Circuit for further consideration in light of United States v.. Booker, 543 U.S. 220 (2005). Husband v. United States, 546 U.S. 802 (2005). The Fourth Circuit then remanded the case to this court for re-sentencing pursuant to the procedures

1 Ms. Shein also represented petitioner through re-sentencing and on appeal from re-sentencing. Ms. Shein affiliated with Jennifer T. Stanton, Esquire as local counsel for the re-sentencing hearing. Ms. Stanton filed, on petitioner's behalf, the Motion for Relief pursuant to § 2255 currently before the court. Ms. Stanton withdrew as counsel for petitioner on her motion, as granted by the court's order of July 22, 2008. Mr. John Rockecharlie currently represents petitioner in this matter.

established in Booker and Fourth Circuit post-Booker precedent. United States v. Husband, 235 Fed. App'x 54 (4th Cir. 2006) (per curiam) (unpublished) (Husband II).

On November 8, 2006, this court re-sentenced petitioner to a term of three hundred sixty (360) months imprisonment. The other terms of the sentence, including supervised release and monetary fines, remained the same as those imposed previously. Petitioner appealed this revised sentence, and the Fourth Circuit affirmed. United States v. Husband, 235 Fed. App'x 55 (4th Cit. 2007) (per curiam) (unpublished) (Husband III).

Petitioner timely filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 on May 30, 2008. The government filed a response on July 31, 2008. Petitioner filed an untimely reply on September 2, 2008.[2] The motion is now ripe for review.

II. Standard of Review

A prisoner in custody pursuant to a sentence imposed by a federal court may file a motion pursuant to 28 U.S.C. § 2255. There are four grounds for granting § 2255 relief: (1) that the sentence was imposed in violation of the Constitution or the laws of the United States; (2)

that the court was without jurisdiction to impose such sentence; (3) that the sentence was in excess of the

2 The deadline by which petitioner was to respond was August 6, 2008. The Clerk shall lift the defect, and the court will consider the late reply.

maximum authorized by law; or (4) that the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255. To prevail under § 2255, the petitioner bears the burden of proof by a preponderance of the evidence. Miller v. United States, 261 F.2d 546, 547 (4th Cir. 1958)

In deciding a § 2255 motion, the court need not hold a hearing if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. As the matter has been fully and adequately briefed by both parties, the court finds it unnecessary to hold a hearing.

III. Analysis

Petitioner asserts that he received ineffective assistance of counsel. To prove a claim of ineffective assistance of counsel, petitioner must demonstrate (1) that his attorney's performance was deficient, and (2) that the deficient performance prejudiced the outcome of his case. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); Strickland v. Washington, 466 U.S. 668, 687 (1984) Under Strickland, an attorney's performance is deficient if it is not reasonable "under prevailing professional norms." Id. at 688. To prove prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." Id. at 694. Failure to show either deficiency or prejudice defeats a petitioner's ineffective assistance of counsel claim; therefore, a court need not address both components if the petitioner makes an insufficient showing on one part of the test. Id. at 697, 700.

Petitioner bases his claim of ineffective assistance of counsel on six arguments: (1) trial counsel[3] failed to raise a statute of limitations defense; (2) trial counsel failed to raise a multiplicity objection to the indictment; (3) trial counsel failed to raise a venue challenge; (4) trial counsel failed to advise petitioner of the elements of the offenses charged and the possibility that petitioner might receive consecutive, rather than concurrent, sentences on those counts;[4] (5) re-sentencing counsel[5] failed to object to the application of the 2002 Sentencing Guidelines at re-sentencing; and (6) re-sentencing counsel failed to argue at re-sentencing that application of the 2002 Sentencing Guidelines constructively amended the indictment in matter and

3 Hereinafter, Christopher J. Collins will be referred to as "trial counsel."

4 In an affidavit, trial counsel avers that he did not research, discuss with petitioner, or raise several possible defenses, including a statute of limitations defense and a

multiplicity defense, and that, because of his failings, petitioner's case on appeal to the Fourth Circuit was prejudiced. Collins Aff. at 2. The affidavit does not contain any more detail about why or how his representation was constitutionally ineffective under the Strickland standard. Trial counsel's conclusions are irrelevant, because it is not deficient performance to fail to raise meritless arguments. Trial counsel's statements that petitioner was prejudiced do not overcome petitioner's failure to demonstrate the first prong of the Strickland test. See infra at Part III.A and B

5 Hereinafter, "re sentencing counsel" will refer to Marcia G. Shein.

failed to pursue that theory on direct appeal from the resentencing. Each of his claims will be addressed separately.

A. Trial Counsel's Failure to Raise a Statute of Limitations Defense

Petitioner asserts trial counsel was ineffective for failing to move to dismiss the indictment on the ground that the offenses were barred by the statute of limitations. Specifically, he argues that the limitations period applicable to § 2251 (a), the statue which petitioner pleaded guilty to violating, is five years under 18 U.S.C. § 3282. Petitioner asserts that, because the sexually exploitative acts with his minor daughter took place between 1995 and 1996, the limitations period ran between 2000 and 2001.

In making this argument, petitioner attempts to relitigate a claim that has already been decided on direct appeal. In Husband I, petitioner argued that the applicable statute of limitation had expired and that his guilty plea should not have been accepted by this court. The Fourth Circuit found this argument "meritless" noting that the final element of petitioner's crime was not complete until 2001, when the videotape containing the sexually exploitative images was transported across state lines. Husband I, 119 Fed. App'x at 480-81 (explaining further that, "the crime was inchoate until 2001 when the

videotape crossed state lines."). The Fourth Circuit also specifically found that trial counsel could not have been constitutionally ineffective for failing to make a meritless argument. Id. at 485. A claim that has been decided on direct appeal cannot be relitigated under § 2255. Boeckenhaupt v. United States, 537 F.2d 1182, 1183 (4th Cir. 1976).

Moreover, petitioner asserts that his counsel was ineffective for failing to raise the statute of limitations defense and failing to inform petitioner of his right to avail himself of this defense. Because failure to raise a meritless argument does not support a finding that the performance of petitioner's trial counsel was deficient, petitioner has not made a threshold showing of ineffective assistance of counsel.

Petitioner also alleges that trial counsel's failure to raise the argument prejudiced him on appeal because the claim was reviewed under a plain error, not de novo, analysis. This argument, too, must fail given that the statute of limitations issue was entirely without merit. The standard of review is irrelevant if the claim itself is meritless. The facts on the limitations claim are not in dispute — even if the issue had been raised and fully litigated in the trial court, the result would have been the same. See Husband I, 119 Fed. App'x at 481 (finding that the case is "unquestionably within any applicable statute of limitations.").

Petitioner's has not made a showing that trial counsel, by failing to raise a statute of limitations defense, "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687. Accordingly, this ground for objection is denied.

B. Trial Counsel's Failure to Raise a Multiplicity Objection

Petitioner next asserts that the charges in the indictment were multiplicitous in violation of his Fifth Amendment rights against Double Jeopardy and, by failing to raise a multiplicity objection to the counts in the indictment, his trial counsel was ineffective. Specifically, petitioner argues that because he only once transported the videotape depicting various images of sexual exploitation of a minor, he cannot be charged with eight counts of violating 18 U.S.C. § 2251(a).

Multiplicity can refer to either the "charging of a single offense in several counts," or the charging of each act in a series of identical acts as though each act were a separate crime. United States v. Allen, 13 F.3d 105, 107 (4th Cir. 1993) (internal citations omitted). Petitioner argues that his case fits the first definition of multiplicity because he alleges that he committed only one crime, but it was charged in eight counts. In such a case, the pertinent

inquiry to determine whether multiplicity has occurred becomes defining the correct unit of prosecution under the statute. Bell v. United States, 349 U.S. 81, 83 (1955); see also United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952) (defining the "only issue" in a similar case alleging multiplicity to be what "Congress has made the allowable unit of prosecution").

While the Fourth Circuit has never addressed the appropriate unit of prosecution under 18 U.S.C. § 2251(a), the Tenth Circuit has done so. That circuit, as the only federal circuit to have addressed the question, reached the conclusion that each "use" of a minor to create a visual depiction constitutes a separate and distinct violation, and thus represents the correct unit of prosecution. See United States v. Esch, 832 F.2d 531, 541-41 (10th Cir. 1987) (holding that, because each sexually explicit photograph of children amounted to a separate and distinct exploitation of children, an indictment charging a separate count for each photograph was not multiplicitous).

Petitioner argues that the appropriate unit of prosecution is the transportation of the videotape containing the sexually explicit images. In support of this argument, he relies on a string of cases from the Fifth Circuit discussing the appropriate unit of prosecution under 18 U.S.C. § 2252. Petitioner's arguments are misplaced, as § 2252 deals with

transportation and possession of exploitative materials, while the core of § 2251(a), the statute under which petitioner was convicted, is the exploitative acts themselves.

This court instead finds persuasive the Tenth Circuit's conclusion that the "key element" of a § 2251(a) offense is the use of a minor to engage in sexually explicit conduct for the purpose of creating a visual depiction thereof. Esch, 832 F.2d at 542 (noting further that the statute's legislative history which indicates Congress's intent was "to protect children from abuse inherent in the production of pornographic materials.") (internal citations omitted). Petitioner was charged with eight violations of § 2251(a) based on eight separate instances of sexual exploitation, each of which was recorded on the videotape at issue. Petitioner "used" a minor child to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct eight separate times. Because petitioner violated the statute on eight separate occasions, his multiplicity argument is without merit.

Consequently, petitioner's trial counsel cannot be found to be ineffective for failing to raise an argument that is meritless. The Strickland standard requires petitioner to demonstrate both that his attorney's performance was "objectively deficient" and that the deficient performance

prejudiced the outcome of his case. Strickland, 466 U.S. at 687. Failure to raise a meritless objection cannot be deficient at all, much less "objectively" so.

C. Trial Counsel's Failure to Challenge Venue

Petitioner also argues that trial counsel was ineffective for failure to move to dismiss the indictment on the grounds that venue did not lie in the Eastern District of Virginia. In support of this proposition, petitioner relies on the fact that, because the sexually explicit images were created in New York, the essential conduct elements of the offense did not occur in Virginia.

The Fourth Circuit's reasoning in Husband I undermines this argument. As outlined above, the Fourth Circuit determined that petitioner's crimes were not complete until the videotape crossed the Virginia border. Husband I, 119 Fed. App'x at 480-81. While Congress has not expressly provided for venue under § 2251(a), venue is to be "determined from the nature of the crime alleged and the location of the act or acts constituting it." United States v. Anderson, 328 U.S. 699, 703 (1946) (quoted in United States v. Cabrales, 524 U.S. 1, 6-7 (1998)). Because petitioner's crimes were completed in the Eastern District of Virginia, where the tape came to rest, venue is appropriate in this district. See also, United States v. Reigle, 228 Fed. App'x 353, 356 (4th

Cir. 2007) (unpublished) (finding venue as to § 2251 (a) (1) charges proper in the district where child pornography was found, despite the pornography having been produced in another district).

Petitioner's venue argument is without merit. Had a venue objection been raised, the court would have overruled it. Regardless of whether petitioner's trial counsel was deficient in failing to raise or counsel petitioner about a potential venue issue, petitioner has not shown a "reasonable probability" that the result of the proceeding would have been different. Strickland, 466 U.S. at 694.

D. Trial Counsel's Failure to Advise Petitioner of the Elements of Offenses Charged and the Possibility of Consecutive Sentences

Petitioner next asserts that trial counsel was ineffective in failing to properly advise him of the elements of the offenses with which he was charged, as well as the possibility that he could receive consecutive, rather than concurrent, sentences. As such, petitioner argues that his plea was not knowing, intelligent, and voluntary.

Petitioner concedes that this court read the indictment to him at sentencing, but argues that the court violated Federal Rule of Criminal Procedure 11 ("Rule 11") because it did not advise petitioner of the

nature of each charge to which he was pleading. The "nature of the charge," petitioner avers, must refer to the actual elements of the offense. Petitioner's allegation is in direct contradiction to the representations he made at his plea colloquy. Under oath, and after the court reviewed each count of the indictment, petitioner confirmed that he did not have any questions about the charges against him to which he was pleading guilty. Plea Hr'g Tr. at 11. "Absent clear and convincing evidence to the contrary, a defendant is bound by the representations he makes under oath during a plea colloquy." Fields v. Attorney General of State of Md., 956 F.2d 1290, 1299 (4th Cir. 1992). Petitioner not only has failed to present clear and convincing evidence, but he has not presented any evidence at all. Additionally, this argument must fail because the Fourth Circuit, in Husband I, concluded that this court adequately complied with the mandates of Rule 11. Husband I, 119 Fed. App'x at 482.

Petitioner also alleges that he was unaware of the possibility of consecutive sentences. As the Fourth Circuit noted, however, this court explained in detail at the Rule 11 plea colloquy Husband's exposure at sentencing. Id., at 483 (noting that "any reasonable reading of the transcript indicates that [petitioner] knew or should have known that the equivalent of consecutive sentences was possible through upward departure."). To the extent that petitioner is attempting to re-litigate the sufficiency

of his plea colloquy, he is barred from doing so. Boeckenhaupt, 537 F.2d at 1183. The Fourth Circuit determined that this court adequately complied with Rule 11 and that no additional information would have been likely to affect petitioner's willingness to plead guilty. Husband I, 119 Fed. App'x at 482 (citing United States v. Goins, 51 F.3d 400, 402 (4th Cir. 1995) for the proposition that, in accepting a guilty plea, the court must simply determine whether the defendant's knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty).

Petitioner next alleges that his plea was not knowing, voluntary, or intelligent because trial counsel failed to discuss with him the possible statute of limitations, multiplicity, and defective venue defenses, or to warn petitioner that he would waive these defenses by pleading guilty. To the extent that petitioner is attempting to relitigate an argument raised on appeal, he is precluded from doing so. Boeckenhaupt, 537 F.2d at 1183. See Husband I, 119 Fed. App'x at 482 n.5 (dismissing petitioner's argument that his plea was not knowing and voluntary because he was unaware of his appellate counsel's statute of limitations argument, and noting that a criminal defendant, such as petitioner, wishing to rely on his "ignorance of a meritless affirmative defense to overcome an otherwise knowing guilty plea" should consider other

arguments.). As discussed above, supra Part III.A, B, and C, these arguments are all without merit. Failure of trial counsel to bring meritless arguments to petitioner's attention does not alter the propriety of his plea.

Finally, the ineffective assistance of counsel standard requires a demonstration of prejudice to the petitioner resulting from deficient performance of counsel. Any alleged deficiencies in counsel's discussion with petitioner about the contents of his plea were cured during the lengthy plea colloquy this court engaged in with petitioner. As the Fourth Circuit explicitly stated, petitioner's "knowledge and comprehension of the full and correct information would not have been likely to affect his willingness to plead guilty." Husband I, 119 Fed. App'x at 482, quoting Goins, 51 F.3d at 402. This ground simply fails.

E. Re-Sentencing Counsel's Failure to Object to the Application of the 2002 Sentencing Guidelines at Re-Sentencing

Petitioner next asserts re-sentencing counsel was ineffective in failing to object to the use of the 2002 Sentencing Guidelines, rather than the 1995 Sentencing Guidelines, during his resentencing hearing. Alternatively, petitioner contends that re-sentencing counsel should have argued that use of the 2002 Guidelines violated the ex post facto clause

of the United States Constitution.

At petitioner's initial sentencing in 2003, this court utilized the 1995 version of the Sentencing Guidelines. In Husband I, the Fourth Circuit explicitly stated that, because the crimes at issue were completed in 2001, the 2002 Sentencing Guidelines should have been used at petitioner's initial sentencing in accordance with Guideline § 1B1.11 (unless doing so would violate the ex post facto clause, the sentencing court should use the "Guidelines Manual in effect on the date that the defendant is sentenced.") Husband I, 119 Fed. App'x at 481 n.4 (noting that, although this court incorrectly used the 1995 Guidelines at petitioner's sentencing, the error was in petitioner's factor, and was thus harmless). The Fourth Circuit also explained that, because the 2002 Guidelines were identical to those in effect in 2001, no ex post facto considerations were implicated. Id.

Because use of the 2002 Guidelines was proper, and because such use does not implicate the ex post facto clause, petitioner's arguments are without merit. Had petitioner's re-sentencing counsel objected to the use of the 2002 Guidelines at resentencing, the objection would have been overruled based on the Fourth Circuit's holding in Husband I. Petitioner has shown no prejudice or deficient performance on the part of re-sentencing counsel. See Strickland at 687.

F. **Re-Sentencing Counsel's Failure to Allege that Application of the 2002 Sentencing Guidelines Constituted a Constructive Amendment of the Indictment**

Petitioner argues that re-sentencing counsel was ineffective when she failed to argue at re-sentencing and on the second direct appeal that this court's use of the 2002 Sentencing Guidelines at re-sentencing operated as a constructive amendment to petitioner's indictment. Because there were changes to 18 U.S.C. § 2551(a) between 1995, when the acts occurred, and 2003, when he was resentenced, petitioner asserts that use of the 2002 Sentencing Guidelines broadened or altered the charges in the initial indictment.

A constructive amendment to an indictment occurs when either the government or the court broadens the possible bases for conviction beyond those presented by the grand jury. United States v. Floresca, 38 F.2d 706, 710 (4th Cir. 1994). See also United States v. Rosen, 444 F.Supp. 2d 664, 667 (ED. Va. 2006) (explaining that the prohibition against constructive amendments is based in the Fifth Amendment guarantee that the charges in an indictment may not be broadened through amendment except by the grand jury itself) (emphasis added). Even assuming that this court did not utilize the appropriate sentencing guidelines at

resentencing, despite the Fourth Circuit's finding to the contrary,[6] the guidelines could not possibly amend the indictment because petitioner had already pled guilty and been convicted three years earlier. The guidelines have no impact on the elements of the crime, the charges brought, or any other "bases for conviction." They merely suggest a range in which a court can sentence an individual after a finding of guilt.

Petitioner's re-sentencing counsel was not ineffective by failing to make a meritless argument. Her performance was not deficient as it was not unreasonable "under prevailing professional norms." Strickland, 466 U.S. at 687. Because petitioner failed to demonstrate any deficient performance on the part of counsel, the court need not address the other component of the Strickland standard. Id. at 697, 700.

IV. Conclusion

To demonstrate ineffective assistance of counsel, petitioner is required to show both that his counsel's performance was deficient and that the deficient performance prejudiced him in some

6 See supra Part III.E.

way. Id. at 687. Petitioner has not made such a showing on any of his six grounds and is not entitled to relief under § 2255. For the reasons set forth above, petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is **DENIED.**

The Clerk is **DIRECTED** to send a copy of this Memorandum Opinion and Final Order to current and all former counsel for petitioner and to the Assistant United States Attorney.

IT IS SO **ORDERED.**

REBECCA BEACH SMITH
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
October 15, 2008

AFFIDAVIT

I am Christopher J. Collins, Esq., 304 Main St Richmond, VA 23219.1 am an attorney licensed in Virginia since 1977 and am an attorney in good standing with the Bar. My Bar Number is 16732.

I was retained to represent Jimmy Richard Husband in the matter of *U.S.* v. *Husband,* docket number 4:02cr125., on seventeen counts of sexual exploitation of a minor in violation of 18 U.S.C. §225l(a), one count of transportation of child pornography in violation of 18 U.S.C. §2252A(a)(1), two counts of possession of child pornography in violation of 18 U.S.C. §2252A(a)(5)(B). During my representation of Mr. Husband, counts nine through seventeen were dismissed with prejudice due to the fact the victim was over the age of eighteen for those respective counts.

I was called by Mr. Husband the weekend before trial and advised him that the government would drop counts Eighteen through Twenty if he pleaded guilty to counts one through "eight straight up". There would be no plea agreement I did not advise Mr. Husband that he was potentially facing up to ten (10) years on each of those counts and that the court could run them consecutively. I believed the court would run them concurrently.

I did discuss with Mr. Husband the

possibility of a venue challenge which he and. I decided would be brought up at trial. I did not, however, research or discuss with Mr. Husband, any other defenses, such as a statute of limitations defense, a multiplicity defense, the fact the eight counts of the indictment he was pleading to failed to allege a date the tape may have entered into Virginia, I did discuss the possibility of an upward departure. I did not look into whether the government had any actual proof (not bare allegations as in the indictment) as to the date of transportation of the videotape or who may have transported it into Virginia. My statements to the District Court at sentencing that, "It was, in fact, his taking it across state lines that made it a federal case" (JA 115) was in no way intended to acknowledge the Government could prove that element of the offense, or that Mr. Husband was the one who transported the tape. It was merely meant to acknowledge that ***if*** the government could prove the interstate commerce element, then a federal case could potentially be made. I did not object when the government failed at the plea on April 7,2003 to state a sufficient factual basis for the plea when they failed to state anything about the interstate commerce element (the tape crossing state lines), and I should have done all of these things in his defense.

At every hearing in this case, the trial judge made it clear she would not allow me to make full

arguments on behalf of my client and I felt threatened by her attitude and demeanor towards me and my client. I mistakenly trusted the prosecutor who lead me to believe my client would get a sentence based on one charge and that the Government would ask for a upward departure. JA117;SentHrg.7-15-03@57

Because of I failed to raise these issues at the trial level, Mr. Husband's case on review before the Fourth Circuit Court of Appeals was prejudiced. His standard of review for these issues became one he could not meet.

Christopher J. Collins

COMMON WEALTH OF VIRGINIA
CITY OF RICHMOND

Subscribed and Sworn to before me this 28th day of May, 2008. by Christiopher Collins, in person.

Notary Public
Notary ID: 256128

CORRECTED OPINION

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-4630

UNITED STATES OF AMERICA,
Plaintiff -- Appellee,

versus

JIMMY RICHARD HUSBAND,
Defendant — Appellant.

On Remand from the Supreme Court of the United States.
(No. 04-1698)

Submitted: February 17, 2006 Decided:

Before: WILKINSON, GREGORY, and SHEDD, Circuit Judges.

Affirmed in part, vacated in part, and remanded by unpublished per curian opinion.

Marcia G. Shein, Decatur, Georgia, for Appellant. Paul J. McNulty, United States Attorney, Michael C. Moore, Assistant United States Attorney, Norfolk, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

In April 2003, Jimmy Richard Husband pled guilty to eight counts of sexual exploitation of a minor, in violation of 18 U..S.C. §§ 2251 (a), (d) (1994). The district court sentenced Husband to eighty-seven months of imprisonment on each of the eight counts and ordered that the terms be served consecutively, for a total of 696 months. We affirmed his convictions and sentence. United States v. Husband, No. 03-4630, 119 F. App'x 475 (4th Cir. 2005). Husband filed a petition for a writ of certiorari in the Supreme Court. On October 3, 2005, the Supreme Court granted the petition, vacated this Court's judgment, and remanded for further consideration in light of United States v. Booker, 543 U.S. 220 (2005). See Husband v. United States, 126 S. Ct. 322 (2005).

On remand, Husband argues that his sentence is unconstitutional in light of the Supreme Court's decision in Booker. In Booker, the Supreme Court held that the mandatory manner in which the federal sentencing guidelines required courts to impose sentencing enhancements based on facts found by the court by a preponderance of the evidence, violated the Sixth Amendment. 543 U.S.. at 233-34 (Stevens, J., opinion of the Court). The Court remedied the constitutional violation by severing two statutory provisions, 18 U.S.C.A. §

3553(b) (1) (West Supp. 2005) (requiring sentencing courts to impose a sentence within the applicable guideline range), and 18 U.S.C.A. § 3742(e) (West 2000 & Supp. 2005) (setting forth appellate standards of review for guideline issues), thereby making the guidelines advisory. Id. at 245-46 (Breyer, J., opinion of the Court).

We vacate Husband's sentence and remand for resentencing consistent with the Booker decision. Although the sentencing guidelines are no longer mandatory, Booker makes clear that a sentencing court must still "consult [the] Guidelines and take them into account when sentencing." 543 U.S. at 264. On remand, the district court should first determine the appropriate sentencing range under the guidelines, making all factual findings appropriate for that determination. See United States v. Hughes, 401. F.3d 540, 546 (4th Cir. 2005). The court should consider this sentencing range along with the other factors described in § 3553, and then impose a sentence. Id. If that sentence falls outside the guidelines range, the court should explain its reasons for the departure as required by § 3553 (c) (2) . Id. The sentence must be "within the statutorily prescribed range and . . . reasonable." Id. a: 546-47.

Because the Supreme Court's remand order does not affect our rejection in our prior opinion of Husband's claims that the statute of

limitations had expired, that his plea was not knowing and voluntary, that there was no adequate basis for accepting his plea, and that he received ineffective assistance of counsel, we affirm Husband's convictions for the reasons set forth in the prior opinion. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART,
VACATED IN PART, AND REMANDED